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No. 00-1016

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

ALLIED PILOTS ASSOCIATION,
RICHARD T. LAVOY,
AND
BRYAN A. MAYHEW,
Petitioners,

v.

AMERICAN AIRLINES, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The open question in this Court presented by this case and by our *certiorari* petition concerns the contempt/procedural due process principle of *Mine Workers v. Bagwell*, 512 U.S. 821 (1994), and its proper application to compensatory civil contempt cases. *See* Pet.(i).

For the most part, Respondent American Airlines, Inc. ("American"), in its Brief in Opposition ("Opp. Br."), would have it that *Bagwell*'s contempt/due process teachings and the requirements of due process are an irrelevancy in this case in that—on American's tendentious account—the District Court's contempt findings have adequate evidentiary support. *See* Opp. Br. 4-14, 20-22.

Beyond that, after recognizing and stating *Bagwell* (Opp. Br. 14-16), American argues first that the proceedings in this case satisfied due process (Opp. Br. 17-22), and then that civil contempt proceedings are "ancillary" proceedings, and, as such, do not in any event call for "the maximum procedures" of civil due process (Opp. Br. 22-24).

Given American's approach this reply is in two parts: *First*, to refocus this matter on the issues that are germane at this jurisdictional stage, we briefly summarize the case for granting the writ here and underline American's inability to offer any cogent rebuttal thereto. *Second*, we take up the points that American does essay and demonstrate that each is not only unresponsive but unsound in its own terms.

1. The gist of our *certiorari* petition is that the open question presented is a due process question of the first magnitude that goes to the fair and even-handed adjudication of claims that a party has violated an injunction. It is our submission that *certiorari* is warranted here because the Fifth Circuit's answer to this question is wrong in its holding,

wrong in its method, and pernicious in its inevitable consequences:

(a) The Court of Appeals' holding—that a party facing compensatory civil contempt charges bottomed on allegations of past out-of-court disobedience to a complex injunction, where enormous financial consequences are at stake and proof of liability requires findings of fact regarding compliance, ability to comply, and the imputation of responsibility for alleged nationwide wrongdoing to a national organization and its officers—is wholly inconsistent with basic notions of due process and with *Bagwell*'s contempt/due process teachings.

(b) The Court of Appeals' method—refusing "to apply the principle enunciated in *Bagwell*" and instead relying on lower court precedents that are inapposite, outdated, or both, Pet. App.16a-17a—is an abdication of its responsibility as a lower federal court to follow this Court's guidance in deciding substantial legal questions.

(c) By placing an appellate imprimatur on the shotgun process by which this case was adjudicated in the District Court, the decision below has mischievous potential that reaches far beyond this case. The Fifth Circuit's holding can only encourage the kind of trial court contempt proceedings—and the concomitant judicial abuses—that this Court's entire contempt/due process jurisprudence is intended to prevent: The adjudication, by the judge who issued an injunctive order, of allegations of disobedience to that order through procedures that differ markedly from those that have been established over the years as the basic requisites of due process for comparable non-contempt proceedings. Such an encouragement is particularly troubling in that, as one commentator has recently observed:

> The U.S. Supreme Court decided *Bagwell* in mid-1994. ... All in all, the predominant reaction of the

> lower courts, particularly state courts, has been a *sub rosa* rejection of the *Bagwell* holding. These courts may resist, perhaps subconsciously, the imposition of additional procedural restrictions upon what they view as an inherent judicial prerogative and a mechanism of self-preservation. [Margit Livingston, "Disobedience and Contempt," 75 Wash. L. Rev. 345, 390-91 (2000) (footnotes omitted).]

On all of the foregoing American has nothing to say in response or rebuttal.

2. (a) Turning now to the points American chooses to put into play, we begin with the Company's long, impassioned defense of the District Court's contempt findings as correct. Opp. Br. 2-14. We most certainly disagree. But we did not seek *certiorari* on the District Court's contempt findings, as trial-court errors in finding the facts—even gross errors—do not warrant this Court's intervention. We do note that American's shifting claims as to the Petitioners' "violations" of the TRO's requirements were attenuated in the extreme, that American's evidentiary showing at the contempt hearing was skeletal in the extreme, and that American's recitation goes beyond the District Court in taking profound liberties with the record.[1]

(b) To the extent that it does treat with *Bagwell*'s contempt/due process principle and its rationale, American

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[1] In our petition, we reviewed the undisputed record evidence regarding the Petitioners' TRO compliance efforts at Pet. 4-5, and we reviewed the evidence submitted at the February 12 liability hearing at Pet. 6-8, and will not trench on the Court's time by cataloging those matters a second time. Given that American gives pride of place to three pre-TRO e-mails that were attached to American's TRO application, to the point of attaching them to its brief in this Court (Opp. Br. 2, 3, 5-7, 8 n.5, 1a-7a), we do add that *none* of those e-mails was admitted into evidence in the February 12 contempt hearing, and, perforce, there was *no* evidence submitted at that hearing that LaVoy or Mayhew knew of those e-mails.

does so by arguing that these compensatory civil contempt proceedings did meet the requisite due process standard. Nothing could be further from the truth.

(i) American begins by characterizing the proceedings as "expedited, but far from summary." Opp. Br. 17; *see also id.* at 20-21. If this were the test, we would take issue with American's characterization. But it is the actual substance and character of those proceedings that matters. In that regard, the Petitioners were found liable for compensatory civil contempt—a liability later valued at $45,000,000—through the following proceedings:

- an American motion for an order to show cause (filed less than 24 hours after issuance of the TRO) and a District Court order to show cause issued immediately on the filing of the motion, both of which were served on the Petitioners together as a *fait accompli* at 5:00 p.m. on Day One;
- a one-day liability hearing, starting at 10 a.m. on Day Two;
- a contempt liability ruling issued at 10 a.m. on Day Three, which the District Court later ruled was preclusive on the question of liability; and
- "damages" proceedings, lasting three days over the next two months, during which Petitioners were precluded from "relitigat[ing]" or "revisit[ing]" contempt liability—notwithstanding that the District Court permitted *American* to supplement the liability record with exhibits that featured prominently in that court's augmented June 23 liability findings. *See* Pet. 2, 5-13.

American's "expedited, but by no means summary" characterization is thus nothing more than a PR spin on the procedural facts. And, the procedural facts show that the

District Court's conclusive liability findings and conclusions were made without affording the Petitioners any of the ordinary incidents of due process applicable in a civil damages lawsuit involving issues of comparable complexity and a potential liability of comparable magnitude—*viz.*, a reasonable time within which to prepare a defense, an opportunity for discovery, and a full trial on the merits.

(ii) Under the *Bagwell* principle and its rationale, such a departure from the ordinary incidents of due process is not countenanced in the contempt arena without justification, and the touchstone for "justifying expedited [contempt] procedures" is the principle of "necessity." 512 U.S. at 832. And, on "necessity," American urges that "Petitioners' ongoing defiance [of the TRO] justified the expedited, but far from summary, procedures" employed by the District Court to adjudicate compensatory contempt below. Opp. Br. 17. American elaborates that "[t]his case demonstrated the power of compensatory civil contempt sanctions to quickly end civil contempt." Opp. Br. 19.

American's argument conflates *compensatory* civil contempt into *coercive* civil contempt and elides the critical differences between the two. It is those differences that make expedited/summary procedures constitutionally acceptable in *coercive* contempt but *not* in *compensatory* contempt, and it is the efficacy of expedited/summary coercive contempt procedures that makes expedited/summary compensatory contempt procedures both unnecessary and improper.

Coercive civil contempt proceedings are the time-honored means for securing obedience in the face of a continuing or threatened violation of a court order. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). In coercive civil contempt proceedings, the court utilizes day-to-day sanctions to "exert a constant coercive pressure, and once the jural command is obeyed," any future fine liability or imprisonment is "purged." *Bagwell*, 512 U.S. at 829. In *Bagwell* terms, the

exigencies attendant upon a continuing violation provide the "necessity" justification for "expedited procedures" in coercive contempt. *Id.* at 833.

Compensatory contempt, by contrast, is not concerned with securing future obedience but rather with compensating the plaintiff after the fact of disobedience. As this Court observed more than a century ago, compensatory contempt proceedings are "nominally those of contempt [but] really proceedings to award damages to the plaintiff." *Worden v. Searls*, 121 U.S. 14, 26 (1887). Given the retrospective focus of compensatory civil contempt, the necessity principle simply does not justify any departure from the general understanding that "*[l]ike any civil litigant*, a civil contemnor is ... *entitled to those due process rights, applicable to every judicial proceeding*." *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570, 581 (D.C. Cir. 1967)(emphasis added).

The sum of the foregoing is that American's attempt to justify the expedited proceedings by which this *compensatory civil contempt* case was adjudicated on the ground that such expedited procedures were necessary to stop an ongoing violation fails: the District Court's concern that there was an ongoing violation of the TRO's commands justified expedited *coercive* contempt procedures looking to purgable sanctions, *not* expedited compensatory contempt procedures for assessing final liability for monetary harm caused by that "violation."

To be sure, American claims that recognizing that distinction would present the trial courts with a Hobson's choice between "coercive sanctions, providing [the contemnor] with a free pass" for all pre-coercive-contempt-hearing violations, and "discovery, motions, and a full trial on the merits" for compensatory civil contempt. Opp. Br. 18.

American's alarmist argument presents a false dichotomy. Coercive civil contempt and compensatory civil contempt—

while distinct both in terms of their purposes and in terms of the procedures required by due process for each—are not mutually exclusive remedies requiring a court (or a party) irrevocably to elect one or the other. Nothing in the law—and nothing we argue—precludes a court from employing *coercive* civil contempt proceedings of a summary nature and imposing coercive fines payable to the court, and also holding compensatory civil contempt proceedings (affording a full trial on the merits of the charges) in order to compensate the plaintiff for any proven pre-compliance violations.

(iii) This brings us to American's last *Bagwell* argument, which is that the TRO here is not, in *Bagwell* terms, within the class of "'complex injunctions' that require heightened due process." Opp. Br. 18. American's characterization of the injunction here could not be more wrong.

Bagwell distinguished between cases "involving discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," in which "the need for extensive, impartial factfinding is less pressing" on the one hand, and "[c]ontempts involving out-of-court disobedience to complex injunctions," which "often require elaborate and reliable factfinding" on the other. 512 U.S. at 833-34. As the concurring opinion added, the historical equity injunction "usually required 'a single simple act,' " whereas the modern "complex" decree "governs many aspects of a litigant's activities, rather than just a discrete act," and thus "determining compliance becomes much more difficult." 512 U.S. at 840-43 (Scalia, J., joined by Rehnquist, C.J., concurring) (citation omitted).

In these terms, it is plain that the TRO at issue here did not command "discrete, readily ascertainable acts, such as turning over a key or payment of a judgment," but rather was a broad labor injunction whose nine ordering paragraphs governed the

nationwide activities of a 9,300-member labor organization involved in a labor dispute with an international airline:

- In its first, prohibitory paragraph, the TRO enjoined the APA and its leadership from "calling, permitting, instigating, authorizing, encouraging, participating in, approving or continuing any interference with American's airline operations, including but not limited to any strike, work stoppage, sick-out, slowdown or other concerted refusals to fly." Pet. 29.
- The TRO then set forth one very general command directing the APA and its leadership to "take all reasonable steps within their power to prevent the aforesaid actions, and to refrain from continuing the aforesaid actions." *Id.*
- Seven further ordering paragraphs follow, each imposing notification and reporting obligations on the APA and its leadership. *Id.*

The TRO thus goes leagues beyond enjoining "discrete, readily ascertainable acts," *Bagwell*, 512 U.S. at 833, by "govern[ing] many aspects of a litigant's activities," *id.* at 843 (Scalia, J., concurring). And, given the nature and breadth of its commands, a claim of "[c]ontempts involving out-of-court disobedience" to this TRO does raise "more difficult" questions of compliance of the kind that "require elaborate and reliable fact finding," *id.* at 833-34. That being so, the TRO here is most certainly complex in *Bagwell* terms.

In this regard, the D.C. Circuit's decision in *National Org. for Women v. Operation Rescue*, 37 F.3d 646 (D.C. Cir. 1994), on remand for reconsideration in light of *Bagwell*, is very much in point. The *Operation Rescue* injunction, like the TRO here, contained a series of far-reaching prohibitions. *Id.* at 661. The D.C. Circuit noted, therefore, that "[d]etermining whether alleged contemnors have incited, directed, aided or abetted others to commit acts prohibited by

this injunction demands elaborate factfinding." *Id.* And, that court added, this conclusion was supported by the fact that "the district court required ten pages of opinion just to summarize the findings of fact upon which these contempt citations were based." *Id.*

In light of the foregoing, *Operation Rescue* holds that although "the injunction here may be somewhat less 'complex' than that in *Bagwell*. ... on a scale of complexity ranging from simple affirmative acts ... to highly complex *Bagwell*-type prohibitory injunctions ... the out-of-court acts prohibited by the court's order here fall closer to the *Bagwell* end of the spectrum. *Id.* (citation omitted).

Just so here. The TRO's prohibitory paragraph alone is on all fours with *Operation Rescue*. That paragraph enjoined the defendants (and all those legally associated with them or acting at their direction) from various acts disruptive to the airline, and also prohibited "permitting, instigating, authorizing, [or] encouraging" such activities. Pet. 29. And, in fact, the District Court found the APA, LaVoy, and Mayhew liable for the continuance of the sick-out on these very agency grounds. Pet. App. 32a, 52a-53a.

Equally to the point, the contempt claim here, like the claim in *Operation Rescue*, most certainly raised more difficult questions of compliance that demanded elaborate fact finding. The District Court initially issued a seven-page, single-spaced decision—the first five pages of which were factual findings. *See* Pet. App. 29a-36a. And, that court's liability findings swelled to thirty-three single-spaced pages in the final opinion. *See* Pet App. 39a-77a.

(c) American's last-ditch argument—that because its civil contempt citation is, in American's terms, "ancillary to American's complaint for injunctive relief," there is no basis to apply "the maximum procedures in the [Federal Rules of Civil Procedure]" (Opp. Br. 22, 23-24)—is nothing but word

play. Calling a damages claim for alleged out-of-court disobedience of an injunction that raises complex issues and requires elaborate fact finding an "ancillary" rather than a primary claim does not change the nature of the claim, the nature of plaintiff's case, the nature of the defendants' case, or, we submit, the nature of the applicable due process requirements.

Not surprisingly, then, American can cite no authority for its position. *Fox v. Capital Corp.*, 299 U.S. 105 (1936), and *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911) (cited at Opp. Br. 22), hold nothing more than that civil contempt judgments (unlike criminal contempt judgments) may not be appealed until final judgment on the merits of the underlying action. *See Fox*, 299 U.S. at 107; *Gompers*, 221 U.S. at 444-45. Neither case describes civil contempt proceedings as "ancillary." Neither relates the appropriate time for appeal to the procedures that due process requires before a contempt judgments may issue. And, American fails to explain how appealability relates to the due process question. Nor does Rule 26 and the truism that district courts are afforded discretion to manage the discovery process (Opp. Br. 23-24) fill the void. It suffices to say that discretion under Rule 26 does not speak to the basic due process question raised in our petition.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our *certiorari* petition, the petition should be granted.

Respectfully Submitted,

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